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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-482

VICTOR L. MARCHETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Interest of The Authors League

The Authors League of America is a national society of professional writers. One of its principal concerns is the preservation of freedom of expression. The Authors League believes that the Injunction sustained by the Court of Appeals is a grave encroachment on the First Amendment freedoms of authors, publishers and the public.

Preliminary Statement

The Court of Appeals sustained the District Court order prohibiting Petitioner, who resigned from the Central Intelligence Agency three years ago, from submitting to

publishers (or anyone else) any book or article about the CIA, intelligence activities or sources — unless the CIA has reviewed the manuscript and approved its release. The injunction, as modified by the Court of Appeals, subjects Mr. Marchetti to the CIA's prior censorship over any manuscript he has written or may write on these subjects. The Petitioner's brief establishes the corrosive effects of the injunction on First Amendment rights. We agree, for the reasons in his brief, that the injunction and the decision of the Court of Appeals violate these rights (*New York Times Co.* v. *United States*, 403 U.S. 713 (1971); and that certiorari should be granted.

This brief is addressed to the point that the only real effect of the injunction is to infringe the public's First Amendment right to be informed by a former employee of one of its agencies, by imposing prior censorship that does not increase the protection of national security to any appreciable or practical extent.

POINT I

Judicial Enforcement of the Contract is Limited by the First Amendment.

The Court of Appeals agreed that the First Amendment barred the Congress and Executive agencies from imposing by contract and injunction, restraints on free speech that they could not constitutionally establish by statute or regution. In *Shelly* v. *Kraemer*, 334 U.S. 1, 17 (1948) and *Barrows* v. *Jackson*, 346 U.S. 249 (1953) the Court ruled that judges may not issue injunctions (or award damages) to enforce contractual restraints on rights guaranteed by

the Bill of Rights. This prohibition applies, as do the other safeguards of the First Amendment, to executive and administrative agencies. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946); *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507 (1969).

The Court of Appeals also agreed that the Petitioner did not "waive" his First Amendment rights to speak or write about the CIA by signing the secrecy agreements. In reality there was no waiver because the Petitioner was bound to accept these restrictions, as he would have been had they been imposed by regulation. Moreover, the courts would be barred under *Shelly* v. *Kraemer* and *Barrows* v. *Jackson*, supra, from issuing an injunction which restrained First Amendment rights, to enforce the contract, even if the agreement were a "waiver".

Finally, and most important, the First Amendment rights at stake are not solely Petitioner's; and he did not have the power to "waive" them. As the Court emphasized in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the guarantees of the First Amendment "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." (p. 389). The First Amendment protects Mr. Marchetti's freedom to write and publish information about the CIA for the benefit of all of us, to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964)). The First Amendment rights at stake, being "for the benefit of all us", were not Mr. Marchetti's to waive, even if he agreed to do so. While

the Court of Appeals held that enforcement of the contract was governed by the First Amendment, it concluded that the Amendment does not bar prior censorship of the writings of former public servants, whether established by statute or contract, to prevent the disclosure of "classified" information.

POINT II

The System of Prior Restraint Imposed by the Injunction Infringes the Public's First Amendment Right to be Informed.

Infringement of the public's First Amendment right to be informed (and Petitioner's freedom to publish) are the only practical results of the system of prior censorship established by the injunction, as sustained by the Court of Appeals. This drastic exception to the Amendment's prohibition of prior censorship could not accomplish any meaningful increase in national security, certainly none that could warrant the sacrifice of First Amendment rights, even if they must justify their worth under a "balancing" test.

The public is entitled to read information and discussion about its agencies, especially those so vital to its interests as the CIA. Perhaps the most useful source of such information, discussion, and criticism, is the writings of former government employees; by Presidents Truman, Eisenhower and Johnson, by advisers to former Presidents, by officials of the CIA and other highly placed public servants. They have written books and articles which contained information about "the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources

and methods" — the subjects covered by the injunction. Their writings have described CIA activities in connection with the "Bay of Pigs", uprising in Iran, and other matters of public interest; and have disclosed information not previouly made known to the public. Under the Circuit Court's decision, the Government could extend the system of prior censorship to most of these former officials, by contract or statute.

Actually, protection against disclosure by these officials of information harmful to the security of the United States has depended on statutes which punish certain disclosures, after they are made (e.g. Espionage Acts.); and the good faith and common sense of the officials. From a First Amendment viewpoint, nothing more should be permitted; from a practical viewpoint, nothing further — i.e. prior censorship — is worth the cost it exacts. Prior censorship is objectionable because it permits officials, deliberately, negligently, or from an excess of caution — to suppress information the public is entitled to have; and because the whole mechanism, including limited judicial review under vague standards, has a chilling effect on publication.*

The harmful effects of prior censorship of the writings of former government officials and employees cannot be justified on "practical" grounds. Certainly it is not practical to assume that a former employee can be prevented from disclosing "sensitive" information to an unfriendly power by a contractual ban and an injunction. Obviously,

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* Even assuming that some measure of prior screening were compatible with the First Amendment, the system embodied in the injunction is, as Petitioner notes, completely lacking in the precision and safeguards required under *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

if he wanted to communicate that information to a foreign government, he would not publish a book; he would use more private means that do not give the United States the opportunity to seek, or enforce an injunction.

Former officials may disseminate information by speech: to individuals, to reporters and other writers, to lecture audiences and in "live" interviews to television audiences. Unless the Government obtained a broad injunction against every employee who signed a secrecy contract, as soon as he retired, and kept him under constant watch, it could not prevent him—by injunction or other "prior restraint" — from orally communicating, without prior warning, information of the sort that Mr. Marchetti wishes to publish, and other former officials have published in books. The information would thus be available to other countries; a restraint on publication would only limit its effective dissemination to the American public.

Moreover, an ex-employee could avoid prior censorship through injunction, by taking himself and the information in his head to another country, and writing and publishing his book there. Under the Court of Appeals' decision, he might be enjoined from distributing the book in the United States. But again, foreign readers and unfriendly governments would have the material; and the only restraint would be on the right of the American public to receive the information.

We respectfully submit that prior censorship of the books or other writings of former government employees is utterly repugnant to the letter and spirit of the First Amendment. In the last analysis, the overwhelming accomplishment of prior censorship is destruction or curtail-

ment of the public's right to know, and this damage to the foundation on which our democratic society depends, far outweighs any limited protection of "security" that might be claimed for prior censorship.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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